SINGAPORE REPORTS

CHOW KIM HOONG v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Chua & Choor Singh JJ.) July 6, 1971]

[Singapore — Criminal Appeal No. 14 of 1970]

Criminal Law and Procedure — Trial — High Court — Accused tried for murder and for voluntarily causing hurt by dangerous weapon in same trial — Trial by 2 judges — Nullity — Supreme Court of Judicature Act (Cap. 15, 1970 Ed.), s. 10.

Penal Code, ss. 300 and 324 — Trial by 2 judges — Nullity.

The appellant was tried at one trial in respect of two charges, one of murder and the other under section 324 of the Penal Code, before a court by two judges, and was convicted on both charges.

Held: as the provision of section 10 of the Supreme Court of Judicature Act, which requires every proceeding in the High Court to be heard and disposed of by a single judge save as otherwise provided by any written law, had not been complied with, the trial was a nullity and the convictions must be set aside.

COURT OF CRIMINAL APPEAL.

John Tan Chor-Yong for the appellant.

Michael Khoo Kah Lip (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J. (delivering oral judgment): It seems to us absolutely clear that section 10 of the Supreme Court of Judicature Act has not been complied with at the trial of this appellant because section 10 requires every proceeding in the High Court to be heard and disposed of by a single judge save as otherwise provided by any written law. Now in the case of a charge under section 324 or section 326 of the Penal Code the requirements of section 10 must be followed unless, of course, there is a written provision in the Criminal Procedure Code providing that the offence can be tried and disposed of before the High Court comprising of two judges. There is no such written provision in the Criminal Procedure Code.

The effect, therefore, of this appellant being tried at one trial in respect of the two charges, one of murder and the other under section 324 before a court of two judges is that the whole trial, the whole proceeding, is a nullity and as such then we must set aside the convictions and sentences in respect of both charges and order a re-trial. The appellant is to be tried at separate trials in respect of the two charges which were before the court below and we think it would be desirable that the trial in respect of the capital charge should be dealt with first. The appellant is remanded in custody until he is brought before the High Court.

Convictions and sentences set aside. Re-trial ordered.

Solicitors: *John Tan Chor-yong & Co.*

LEE MAU SENG v. MINISTER FOR HOME AFFAIRS, SINGAPORE & ANOR.

[O.C.J. (Wee Chong Jin C.J.) July 13, 1971]

[Singapore — Originating Motion No. 13 of 1971]

Constitutional Law — Habeas corpus — Detention under Internal Security Act (Cap. 115, 1970 Ed.) — Period of detention — Validity of order of detention — Right of person arrested to consult lawyer of his choice — Whether court can examine grounds and allegation of facts to determine whether they are vague unintelligible or inadequate — Whether mala fides is a justiciable issue in context of the Internal Security Act — Internal Security Act (Cap. 115, 1970 Ed.), ss. 8, 9, 11 and 12 — Constitution of Malaysia, arts. 5, 149 and 151 — Constitution of Singapore, arts. 5, 7 and 10(1)(b).

Constitutional Law — Fundamental rights — Person detained under Internal Security Act — Right to counsel — Constitution of Malaysia, art. 5.

This was an application for a writ of *habeas corpus*. On May 2, 1971, the applicant was arrested without warrant, by a police officer and remained in police custody until May 22, 1971, when an order of detention was made by the Minister for Home Affairs under section 8(1) of the Internal Security Act directing that he be forthwith detained for a period of two years. From the date of his arrest on May 2, 1971, until after the order of detention was made on May 22, 1971, the applicant was denied access to his solicitors in spite of requests by his solicitors for access to enable them to be instructed and advice him in regard to his arrest and detention by the police.

Two main but unrelated issues were raised by the applicant. The first was that from the time of his arrest and for 20 days thereafter his constitutional right to be allowed to consult a legal practitioner of his choice had been denied to him and the denial of this constitutional right amounted to an abuse of power such as would have justified an order for his release. The second was that the order of detention made on May 22, 1971 was void or invalid because (a) on the face of the order itself it was ambiguous and *ultra vires* and (b) the grounds on which the order was made and the allegations of fact on which the order was based were vague, inadequate and irrelevant, and (c) the order of detention was made in bad faith and, therefore, his detention was illegal or unlawful.

Held: (1) a person who is lawfully detained under the Internal Security Act is entitled to consult a legal practitioner of his choice as there is nothing in the Act inconsistent with the fundamental rights given by article 5(3) of the Constitution to a person who is arrested to be allowed to consult a legal practitioner of his choice;

(2) *habeas corpus* is not an available remedy to a person who after his arrest by the police and under lawful detention by the police under powers conferred by the Internal Security Act, has been refused by the police to be allowed his constitutional right under article 5(3) of the Constitution to be allowed a legal practitioner of his choice. Such a person must seek other available remedies, such as may be found in section 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap. 15, 1970 Ed);

(3) the words "if the President is satisfied ..." used in section 8(1) of the Internal Security Act must be so construed as to make that section *intra vires*. To construe those words to mean that the Legislature intended the President to be personally satisfied would be in conflict with article 5(1) of the Constitution of Singapore. However, to construe those words to mean "if the President acting in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet is satisfied" would be giving effect to and be completely consonant with the provisions of article 5(1). This view is fortified by the provisions of article 10(1)(b) where the words used, when it is intended that the President is to be personally satisfied, are "if the President *acting in his discretion* is satisfied ...";

(4) the recital in the order of detention in this case followed strictly the language of section 8(1) of the Internal Security Act and there is nothing in the Act requiring that the order should be in any particular form. The order was therefore not invalid for ambiguity or duplicity because the recital stated four grounds in the alternative for detaining the applicant;

(5) article 151 of the Constitution does not prohibit an order of detention from specifying that the citizen named is to be detained for a period exceeding three months. Article 151(1)(b) makes the continued detention of the named citizen after three months unlawful unless its requisites have been complied with;

(6) it is not open to a court in Singapore to examine the grounds and allegations of fact supplied to the applicant pursuant to article 151(1) of the Constitution and section 11(2) of the Internal Security Act for the purpose of deciding whether or not some or all of them are so vague, unintelligible or indefinite as to be insufficient to enable the applicant to make representation against the order of detention;

(7) *"mala fides"* or bad faith is not a justiciable issue in the context of the Internal Security Act and the power conferred by the Act on the President who has to act in accordance with the advice of the Cabinet to direct the issue of the order of detention if he is satisfied under the Act that it is necessary to do so.

[Editorial Note: In this motion the court ordered that the application for the issue of a writ of *habeas corpus* be refused and the applicant was ordered to pay costs to the Attorney-General for three quarter of the taxed costs.]

Cases referred to:-

(1) *V. Deshpande* v. *Emperor* A.I.R. 1945 Nagpur 8.

(2) *Johnson* v. *Zerbst* 58 S. Ct. 1019.

(3) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119, F.C.

(4) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129, F.C.

(5) *R.* v. *Secretary of State for Home Affairs, ex parte Lees*, [1941] 1 K.B. 72.

(6) *The State of Bombay* v. *Atma Ram Shridhar Vaidya* A.I.R. 1951 S.C. 157.

(7) *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi* A.I.R. 1953 S.C. 318.

ORIGINATING MOTION.

Dato' David Marshall (*Amarjit Singh* with him) for the applicant.

Tan Boon Teik (Attorney-General) (*S. Rajendran* (Deputy Senior State Counsel) and *Mrs. Mabel Tai* (State Counsel) with him) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an application by Lee Mau Seng (hereinafter referred to as "the applicant") for a writ of *habeas corpus ad subjiciendum* The applicant was arrested without warrant by a police officer on 2nd May 1971 at his home and detained at the Central Police Station. He remained in police custody until 22nd May 1971 when an order dated 22nd May 1971 directing that he be forthwith detained for a period of two years at the Holding Centre — Central Police Station — was made by the Minister for Home Affairs.

From the date of his arrest on 2nd May 1971 until after the order of detention was made on 22nd May 1971, the applicant was denied by the authorities access to his solicitors in spite of requests by his solicitors for access to him to enable them to take his instructions and to advise him in regard to his arrest and detention by the police.

The order of detention, which was made under section 8(1) of the Internal Security Act (Cap 115 1970 Revised Edition), is as follows: —

"The Internal Security Act, Cap. 115 1970 Ed.
Order of Detention under Section 8(1)(a).

To: The Director of Prisons,
Singapore

and to: The Commissioner of Police, Singapore, all other police officers and to all others whom it may concern.

WHEREAS the President of the Republic of Singapore is satisfied with respect to the undermentioned person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to make the following Order:

NOW, THEREFORE, in exercise of the powers conferred by section 8(1)(a) of the Internal Security Act, Cap. 115, the Minister for Home Affairs, by this Order, hereby orders that

LEE MAU SENG
N.R.I.C. No. 1134018/J
of 319-M, Bukit Timah Road

be forthwith detained for a period of 2 years:

AND, in exercise of the powers conferred by section 8(2) of the Internal Security Act, Cap. 115, the Minister for Home Affairs hereby directs that the said LEE MAU SENG be detained at Holding Centre — Central Police Station or at such other place as he may from time to time direct.

Made at Singapore this 22nd day of May, 1971.

Sd: S.R. Nathan
Ag. Permanent Secretary,
Ministry of Home Affairs,
Singapore."

A copy of the order of detention was served on the applicant on 22nd May 1971 and at the same time he was furnished with a statement in writing as required by section 11 of the Internal Security Act (hereinafter referred to as "the Act"). This statement is as follows: —

"Statement required under Section 11(2)(b) of the Internal Security Act, 1970

Detainee's Name: LEE MAU SENG

GROUNDS ON WHICH AN ORDER OF DETENTION IS MADE:

Since 1970, you, as the General Manager/Managing Director of the Nanyang Siang Pau, Singapore, have conciously, knowingly and willingly veered the editorial policy of the said paper to (a) one of glamourising Communism and (b) stirring up communal and chauvinistic sentiments over Chinese language, education and culture.

ALLEGATIONS OF FACT:

1. Under your management control, the Nanyang Siang Pau has deliberately and systematically instilled admiration for the Communist system. This has been achieved by presenting the Communist system as one free from blemishes. And whilst endorsing its policies, you have highlighted in the domestic news pages the more unsavoury aspects of Singapore life.

2. You have utilised the Nanyang Siang Pau to arouse communal sentiments over the Chinese language, education and culture, and created the impression that Chinese language and education are fighting desperately for survival in Singapore against a Government hostile to the Chinese.

3. In your campaign to work up disruptive and dangerous emotions, you have continuously echoed in the Nanyang

Siang Pau the pro-Communist cry that Singapore's independence was "phoney" by maliciously referring to Singapore as having undergone "150 years of colonial fetters" and that Singapore has not "in fact enjoyed real political freedom".

4. You have used deliberate falsehood to whip up communal fears and openly incite communal hatred against the Government.

Dated at Singapore this 22nd day of May, 1971.

By Direction,
of the Minister for Home Affairs.
Sd: S.R. Nathan
Ag. Permanent Secretary,
Ministry of Home Affairs."

The material provisions of section 8 and section 11 of the Act are as follows: —

"8. — (1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order —

(a) directing that such person be detained for any period not exceeding two years;"

"11. — (1) A copy of every order made by the Minister under paragraph (a) of subsection (1) of section 8 shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations against the order to an advisory board.

(2) For the purpose of enabling a person to make representations under subsection (1) he shall, within fourteen days of the service on him of the order —

(a) be informed of his right to make representations to an advisory board under subsection (1); and

(b) be furnished by the Minister with a statement in writing —

(i) of the grounds on which the order is made;

(ii) of the allegations of fact on which the order is based; and

(iii) of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations to the advisory board."

Section 9 and section 12 of the Act are also relevant sections and they are in the following terms: —

"9. Whenever any person is detained under any order made under paragraph (a) of subsection (1) of section 8 he shall, in accordance with Article 151 of the Constitution of Malaysia, as soon as may be —

(a) be informed of the ground of his detention;

(b) subject to clause (3) of the said Article (which provides that no authority may be required to disclose fact whose disclosure would in its opinion be against the national interest) be informed of the allegations of fact on which the order is based; and

(c) be given the opportunity of making representations against the order as soon as may be."

"12. — (1) Whenever any person has made any representations under sub-section (1) of section 11 to an advisory board, the advisory board shall, within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the President.

(2) Upon considering the recommendations of the advisory board under this section the President may give the Minister such directions, if any, as he thinks fit regarding the order made by the Minister; and every decision of the President thereon shall, subject to the provisions of section 13, be final, and shall not be called into question in any court."

Two main but unrelated issues are raised by the applicant in these proceedings. The first is that from the time of his arrest and for 20 days thereafter his constitutional right to be allowed to consult a legal practitioner of his choice has been denied to him and the denial of this constitutional right amounted to an abuse of power such as would have justified an order for his release. The second is that the order of detention made on 22nd May 1971 is void or invalid because (a) on the face of the order itself it is ambiguous and *ultra vires* and (b) the grounds on which the order was made and the allegations of fact on which the order was based are vague, inadequate and irrelevant and (c) the order of detention was made in bad faith and, therefore, his detention is illegal or unlawful.

These issues are important constitutional issues involving the liberty of the subject and require consideration of article 5, article 149(1) and article 151 of the Constitution of Malaysia as applicable to Singapore (hereinafter referred to as "the Constitution") as well as those sections of the Act which have earlier been referred to.

Article 5 of the Constitution provides as follows: —

"5. — (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

(5) Clauses (3) and (4) do not apply to an enemy alien."

Article 149(1) of the Constitution provides as follows: —

"149. — (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore —

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the President or the Government; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, or anything by law established; or

(e) which is prejudicial to the security of Singapore or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10, or would apart from this Article be outside the legislative power of Parliament: and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill."

Article 151 of the Constitution provides as follows: —

"151. — (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the President.

(2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the President and who shall be or have been, or be qualified to be, a judge of the Supreme Court and two other members, who shall be appointed by the President after consultation with the Chief Justice.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest."

The Right to Consult a Legal Practitioner of one's own choice.

The language of article 5(3) of the Constitution is clear and simple. If a person who is arrested wishes to consult a legal practitioner of his choice, he is, beyond a shadow of doubt, entitled to have this constitutional right granted to him by the authority who has custody of him after his arrest and this right must be granted to him within a reasonable time after his arrest. The only exception, as I see it, is if there is a provision in an enactment, which enactment is not *ultra vires* the Constitution, depriving him of this right. The learned Attorney-General contends that there is such a provision. His submission appears to be this. Article 149(1) says any provision in an Act of Parliament is valid notwithstanding it is inconsistent with any of the provisions of article 5 if that Act of Parliament contains a recital, *inter alia*, that action has been taken or threatened by any substantial body of persons to cause a substantial number of citizens to fear organised violence against persons or property; or that such action is prejudicial to the security of Singapore and if the provision of law in that Act of Parliament is designed to stop or prevent that action. The Act contains such a recital. Section 74 of the Act is inconsistent with the whole of article 5 and, therefore, the whole of article 5 must give way, by inference, to section 74.

It is necessary therefore to examine section 74 of the Act to see whether or not the learned Attorney-General's argument is valid. This section reads as follows: —

"74. — (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore or any part thereof.

(2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by such officer fails to satisfy such officer as to his identity or as to the purposes for which he is in the place where he is found, and who such officer suspects has acted or is about to act in any manner prejudicial to the security of Singapore or any part thereof.

(3) No person shall be detained under the provisions of this section for a period exceeding twenty-four hours except with the authority of a police officer of or above the rank of assistant superintendent of police or, subject as hereinafter provided, for a period of forty-eight hours in all.

(4) If an officer of or above the rank of superintendent of police is satisfied that the necessary enquiries cannot be completed within the period of forty-eight hours prescribed by subsection (3) he may authorise the further detention of any person detained under the provisions of this section for an additional period not exceeding twenty-eight days.

(5) Any officer giving any authorisation under subsection (4) shall forthwith report the circumstances thereof to the Commissioner of Police; and where such authorisation authorises detention for any period exceeding fourteen days the Commissioner of Police shall forthwith report the circumstances thereof to the Minister.

(6) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, by any person performing the duties of guard or watchman in a protected place, and by any other person generally authorised in that behalf under section 3 of the Protected Areas and Protected Places Ordinance, 1959.

(7) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorised generally or specially by the Minister."

There are no expressions in section 74 which expressly state that a person detained by the police under the powers conferred by section 74 is not to be allowed to consult a legal practitioner of his choice. On the plain meaning of the words of that section there is, therefore, no inconsistency with article 5(3) of the Constitution. The learned Attorney-General, however, contends that section 74(7) by implication is inconsistent with article 5(3). He says that must be so because subsection (7) expressly enacts that "any person detained under the powers conferred by this section shall be deemed to be in lawful custody" and thereby raises an irrebuttable presumption that the detention is not, *inter alia*, illegal. I can find nothing of any substance in this contention. While subsection (7) may raise an irrebuttable presumption that the detention is not unlawful, it raises no presumption, inference or implication that its provisions are in any manner whatsoever inconsistent with the right accorded by article 5(3) of the Constitution to a person who has been arrested and detained by the police under section 74 to be allowed to consult a legal practitioner of his choice.

The right to consult a legal practitioner of one's choice is an entirely different concept from the concept of detention without trial and they can exist together. It clearly cannot be inconsistent for a person who can be lawfully detained under preventive detention powers without trial to retain his constitutional right under article 5(3) to be allowed to consult a legal practitioner of his choice.

Another argument advanced by the learned Attorney-General is that by implication the whole of section 74 of the Act is heavily inconsistent with the whole of article 5 of the Constitution and therefore because of article 149(1) of the Constitution, all the fundamental rights guaranteed under article 5 of the Constitution are not available to a person who has been detained by the police under section 74 of the Act. In support of this argument it is said that if the

provisions of section 74 are to have any meaning at all, they must hold sway over article 5 because all the provisions in section 74 allowing a detention exceeding twenty-four hours without production before a magistrate, allowing an officer of or above the rank of superintendent of police to detain a person up to 28 days must imply that any of the fundamental liberties in article 5 that would in any way impede the manner of the investigation or inquiry during this period of preliminary detention have been taken away from him.

It is disturbing to hear a submission which, stated in simple ordinary language, puts forward the proposition that the Legislature, by enacting section 74 of the Act, must have intended to deprive a person of a "fundamental liberty" which the Constitution guarantees to him, namely the right to be allowed to consult a legal practitioner of his choice, so as to enable a police officer acting under preventive detention powers to better carry out enquiries or investigations concerning that person of whom the police officer has reason to believe that there are grounds which would justify his detention under section 8 and of whom the police officer has reason to believe has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore or any part thereof. In my judgment that is an unacceptable proposition. If a person detained under section 74 is to be deprived of this constitutional fundamental right then the Legislature must do so in clear and unequivocal language. Also, if such wide powers are to be conferred on police officers, then the Legislature must confer them in clear and unequivocal language. I can find nothing inconsistent in the language of the whole of section 74 with the fundamental right given by article 5(3) of the Constitution to a person who is arrested to be allowed to consult a legal practitioner of his choice.

Next, I must consider whether the wrongful denial to the applicant of this constitutional right amounted to an abuse of power such as would have justified an order for his release in these proceedings. Mr. Marshall contends that the applicant would have been entitled to an order for his release and relies on some Indian and American authorities. I need refer only to one Indian case — *V. Deshpande* v. *Emperor*[1] where the High Court of Nagpur comprising of two judges at page 14 said: —

"After the decision in I.L.R. 1943 Nag. 154 any refusal in this province to grant an interview along the lines laid down there, or to afford a detenu reasonable facilities for access to legal advice, or any attempt to place obstacles in his way, will amount to an abuse of power and might even justify an order for immediate release."

The American authorities all deal with the Sixth Amendment to the Constitution of the United States of America, the relevant provisions of which provide that —

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence."

As I understand the law in America to be, it has been decided that under the Sixth Amendment, unless an accused at his trial has waived his right to be assisted by counsel, "compliance with this constitutional mandate is an essential prerequisite to a Federal Court's authority to deprive an accused of his life or liberty" so that a conviction of a person who did not effectively waive his constitutional right to counsel for his defence is void as having been rendered without jurisdiction thus entitling the convicted person, to whom expiration of time has rendered relief by way of application for a new trial or by appeal unavailable, to *habeas corpus* as an available remedy (*Johnson* v. *Zerbst*[2]).

In America, therefore, *habeas corpus* is available because a conviction being void, the convicted person's imprisonment is unlawful. The Nagpur decision gives no reason why refusal of access to legal advice might justify an order for immediate release. The principle that the courts will not order the release of a person in *habeas corpus* proceedings unless it can be shown that his detention is illegal or unlawful has been long accepted as fundamental and it would be wrong for me to depart from this principle.

In my judgment *habeas corpus* is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police under powers conferred by section 74 of the Act, has been refused by the police to be allowed his constitutional right under article 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies such as may be found in section 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap. 15).

Is the Detention Illegal or Unlawful?

On this issue the first point for consideration is whether under the provisions of section 8(1) of the Act the President of Singapore is to act in accordance with the advice of the Cabinet or is to act in his discretion. Mr. Marshall contends that article 5(1) of the Constitution of Singapore applies. Article 5 of the Constitution of Singapore reads as follows: —

"5. — (1) In the exercise of his functions under this Constitution or any law the President shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the Government which is available to the Cabinet.

(2) The President may act in his discretion in the performance of the following functions (in addition to those in the performance of which he may act in his discretion under the other provisions of this Constitution) that is to say —

(a) the appointment of the Prime Minister;

(b) the withholding of consent to a request for the dissolution of Parliament.

(3) The Legislature may by law make provision for requiring the President to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of his functions other than —

(a) functions exercisable in his discretion;

(b) functions with respect to the exercise of which provision is made in any other provision of this Constitution or in the Constitution of Malaysia."

Mr. Marshall argues that article 5 of the Constitution of Singapore makes it clear that the President of Singapore must act in accordance with the advice of the Cabinet in the exercise of his functions under the Constitution *or any law*, except as otherwise provided by the Constitution, or where the Legislature

by law expressly provides for the President to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of his functions. When the President exercises the power conferred by section 8(1) of the Act, he is exercising a function under a law and must, therefore, exercise it in accordance with the advice of the Cabinet.

The learned Attorney-General in answer to this contention says article 5 of the Constitution of Singapore does not apply because the provisions of section 8(1) of the Act are so specific and clear and must mean that the President has to be satisfied personally. No doubt the matter would be placed before the President for his consideration by the Cabinet and no doubt the Cabinet would advise the President to direct the appropriate Minister to make the order of detention so that in one sense it can be said that the President has acted in accordance with the advice of the Cabinet but as a matter of construction section 8(1) of the Act gives power to the President to act in his discretion because of the clear meaning of the expression "if the President is satisfied . . . ".

In support of his submission the learned Attorney-General relies on the case of *Stephen Kalong Ningkan* v. *Government of Malaysia*[3] before the Federal Court of Malaysia. Article 150(1) of the Constitution of Malaysia provides that

"if the Yang di-Pertuan Agong is satisfied that a grave emergency exists . . . he may issue a Proclamation of Emergency".

Article 40 of the Malaysian Constitution is in *pari materia* with article 5 of the Constitution of Singapore. The Federal Court by a majority of two to one held, *inter alia*, that the allegation of the appellant that the Proclamation was in *fraudem legis* in that it was made not to deal with a grave emergency but for the purpose of removing (the appellant) from his lawful position of Chief Minister of Sarawak was not justiciable as the Yang di-Pertuan Agong, the Constitutional Head of State of Malaysia, was under article 150(1) the sole judge and once the Head of State

"is satisfied that a state of emergency exists it is not for the court to enquire as to whether or not he should have been satisfied"

(*per* Barakbah L.P. at page 122). Azmi C.J. (Malaya) in his concurring judgment said at page 124:

"The Yang di-Pertuan Agong in exercise of his power under clause (1) of article 150 must be regarded as the sole judge of that. He alone could decide whether a state of emergency whereby the security or economic life of the Federation was threatened did exist."

However, in a later case, *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*,[4] before a Bench of five judges of the Federal Court of Malaysia, the appellant who was detained under section 8 of the Internal Security Act 1960 of the Federation of Malaya, which Act is in *pari materia* with our Internal Security Act (Cap. 115) challenged his detention on the grounds, *inter alia*, that the order of detention was illegal or void as having been made *mala fides*. Three of the five judges dealt with the appellant's contention on the specific basis that the Head of State of Malaysia in the exercise of his power under section 8(1) of the Internal Security Act 1960 has to act on the advice of the Cabinet by virtue of article 40 of the Constitution of Malaysia.

This question is a difficult constitutional one of some importance and on the authorities that have been cited it would appear to remain unsettled and debatable. I propose to answer it by examining the Constitution of Singapore. The main relevant provision in the Constitution of Singapore is article 5 which I have set out earlier. The other relevant provisions of the Constitution of Singapore are article 7 and article 10(1)(b). These read as follows: —

"7. — (1) The executive authority of Singapore shall be vested in the President and exercisable subject to the provisions of this Constitution by him or by the Cabinet or any Minister authorised by the Cabinet.

(2) The Legislature may by law confer executive functions on other persons."

"10. — (1) The President shall, by writing under the public seal, declare the office of Prime Minister vacant —

(b) if the President acting in his discretion is satisfied that the Prime Minister has ceased to command the confidence of a majority of the Members of Parliament:"

By virtue of article 7 the President is the supreme executive authority in Singapore and his executive authority is exercised by him or by the Cabinet or any Minister authorised by the Cabinet but it must be exercised subject to the provisions of the Constitution. Clause (1) of article 5 requires the President to act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet whenever he exercises any of his functions under the Constitution or any law except where the Constitution otherwise provides. Clause (3) of article 5 permits the Legislature by law to make provision for the President to act independent of Cabinet advice in the exercise of his functions but after consultation with or on the recommendation of any person or body of persons other than the Cabinet. Clause (2) of article 5 sets out the two functions under the Constitution which the President can act in his discretion.

It will be seen, therefore, that the President, except where the Constitution expressly provides for him to act in his discretion, is bound by the Constitution to act, in the exercise or performance of his functions under the Constitution or any law, in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, or after consultation with or on the recommendation of any person or body of persons other than the Cabinet.

The words "if the President is satisfied . . . " used by the Legislature in section 8(1) of the Act must in my opinion be so construed as to make that section *intra vires*. To construe these words to mean that the Legislature intended the President to be personally satisfied would in my judgment be in conflict with article 5(1) of the Constitution of Singapore. To construe these words to mean "if the President acting in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet is satisfied" would in my judgment be giving effect to and be completely consonant with the provisions of article 5(1). I am fortified in the opinion I have arrived at by the provisions of article 10(1)(b)

where the words used, when it is intended that the President is to be personally satisfied, are "if the President *acting in his discretion* is satisfied . . . ".

If support is needed for this construction, it can be found in the very nature of the power conferred by section 8 of the Act. It is a power given by the Legislature in a parliamentary democracy to detain a person as a preventive measure and without trial initially for a maximum period of two years and thereafter for periods not exceeding two years at a time. It seems to me inconceivable that Parliament could intend to confer such an arbitrary power on a constitutional Head of State who is not responsible for his actions to Parliament. In my opinion the only permissible construction under a parliamentary democracy must be that Parliament has conferred this power on the Cabinet which under article 8(2) is collectively responsible to Parliament and, therefore, answerable to Parliament for all its actions.

The second point for consideration is whether or not the order of detention is on its face ambiguous and therefore invalid. Mr. Marshall contends that the order is bad for ambiguity or duplicity because the recital in the order states four grounds in the alternative for detaining the applicant. This argument was raised and rejected in *Karam Singh's* case (*supra*) and I would also reject it for the same reasons as expressed by Suffian F.J. in *Karam Singh's* case. Suffian F.J. said (see [1969] 2 M.L.J. at p. 147): —

"The order in the instant case followed the language of section 8 of the Internal Security Act, except for an omission which, in my view, is immaterial. The document in question is not a conviction nor an indictment nor even a charge. There is nothing in the Act requiring that the order should be in any particular form and, in my judgment, the order is not invalid.

It seems to me that there has been confusion in this matter by Dato' Marshall's frequent use throughout his arguments of the word 'grounds'. In my judgment, the words 'with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein' in section 8(1)(a) of the Internal Security Act do not indicate the grounds for a person's detention; they indicate its purpose or purposes. It is true that the grounds for a person's detention must be given, but grounds are quite distinct from purposes."

Suffian F.J. followed the reasoning of the English Divisional Court which was approved by the Court of Appeal in *The King* v. *Secretary of State for Home Affairs, ex parte Lees*.[5] In that case the Home Secretary made an order for the detention of Lees under regulations 18B(1A) of the Defence (General) Regulations 1939 made under powers conferred by section 1 of the Emergency Powers (Defence) Act 1939. The order recited

"whereas I have reasonable cause to believe Aubrey Trevor Oswald Lees to have been or to be a member of or to have been or to be active in the furtherance of the objects of an organisation . . .".

Regulation 18B(1A) provides that

"if the Secretary of State has reasonable cause to believe any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of any such organisation as is hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained".

It is to be observed that the order followed strictly the language of regulation 18B(1A) but Lees argued that it was bad for duplicity in that the two allegations of membership and of activity in connection with the objects of the association are stated in the alternative and that one or other or both of those grounds of belief should appear as the reason for making the order. The Divisional Court rejected this argument. Humphreys J. who delivered the judgment of the court said at page 78: —

"The first ground of objection to the order is that it was and is bad upon the face of it. That part of the order which is material upon this point reads as follows: 'Whereas I have reasonable cause to believe Aubrey Trevor Oswald Lees to have been or to be a member of or to have been or to be active in the furtherance of the objects of an organisation,' etc.

The order, therefore, follows strictly the language of the regulation. It is argued that the order is bad for duplicity in that the two allegations of membership of and activity in connection with the objects of the organisation are stated in the alternative. It is said that they afford separate grounds for the making of an order and that one or other or both of those grounds of belief should appear as the reason for making the order. In our opinion there is nothing in the point. The document in question is not a conviction nor an indictment nor even a charge. Grammatically, it may be perfectly correct to say that the Home Secretary had reasonable cause to believe that the applicant was either a member of or was active in furtherance of the objects of the association so as to justify the making of the order. It might, with equal force, be urged that the words 'to have been or to be' render the order bad upon the face of it.

We find nothing in the statute or the regulations requiring that the order should be in any particular form and, in our judgment, the order is not invalid upon this ground."

The Court of Appeal dismissed Lees' appeal and MacKinnon L.J. with whose judgment the other members of the court agreed said at page 83: —

"I should be almost content to say that I agree with everything that was said in the very careful judgments of the Divisional Court delivered by Humphreys J., which seems to me to cover all the ground and to be manifestly correct."

In the present case the recital in the order of detention follows strictly the language of section 8(1) of the Act and there is nothing in the Act requiring that the order should be in any particular form. The order is, therefore, not invalid on this ground.

The third point raised by Mr. Marshall is that the order of detention is bad because it orders the applicant's detention for two years and is thus *ultra vires* article 151 of the Constitution of Malaysia. He argues that article 151(1)(b) expressly provides that no citizen shall be detained, under a law which provides for preventive detention, for a period exceeding three months unless an advisory board constituted under clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the President. The short answer to this argument is that article 151 does not prohibit an order of detention from specifying that the citizen therein named is to be detained for a period exceeding three months. Article 151(1)(b) makes the continued detention of the named citizen after three months unlawful unless its requirements have been complied with. The

order of detention is, therefore, not invalid on this ground also.

The fourth point raised by Mr. Marshall is that the order of detention is invalid as being an infringement of the constitutional safeguard provided in article 151(1)(a) because the grounds and the allegations of fact supplied to the applicant are so vague, unintelligible and insufficiently clear as to render it impossible for the applicant to make an adequate representation as soon as may be to the advisory board. He relies on several decisions of the Supreme Court of India and principally on *The State of Bombay* v. *Atma Ram Shridhar Vaidya*.[6]

In considering whether the Indian decisions ought to be relied upon, it is necessary to examine the relevant articles of the Constitution of India. In *Atma Ram's* case, *supra*, the Indian Supreme Court were considering the provisions of article 21 and article 22(4), (5), (6) and (7) of the Indian Constitution. These articles are in Part III under the heading "Fundamental Rights" and read as follows: —

"21. No person shall be deprived of his life or personal liberty except according to precedure established by law.

22. — (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless —

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe —

(a) the circumstances under which, and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

Our equivalent of the Indian article 21 is article 5(1) except that in India a person's right to life and personal liberty is qualified by the possibility of the right being lost or taken away from him "according to procedure established by law" whereas in Singapore the right may be taken away from him "according to law". In both countries the right is thus not an absolute one.

Our equivalent of the Indian article 22 is article 5(3), (4) and (5) and article 151 with, however, important differences. The first is that article 22 is in Part III under the heading "Fundamental Rights" whereas our Article 151 is in Part XI under the heading "Special Powers Against Subversion, And Emergency Powers". Another difference is that the Indian article 22(4) prohibits a law providing for preventive detention from authorising detention of a person for a period longer than three months unless an advisory board has reported before the expiration of three months that there is in its opinion sufficient cause for such detention. Our article 151(1)(b) merely provides that under a preventive detention law a citizen shall not be detained for a period exceeding three months unless an advisory board has considered representations made by him and made recommendations to the Head of State. A third difference is that the Indian article 22(5) requires the authority making the order to communicate to the detenu "the grounds on which the order has been made" whereas our article 151(1)(a) requires the authority to inform the detenu "of the grounds for his detention and, subject to clause (3), the allegations of fact on which the order is based". A fourth difference is that our article 151 has no provision similar to the Indian article 22(7) so that our Legislature cannot enact any law under which a citizen of Singapore may be detained for a period exceeding three months without being given the opportunity to make representations against his detention to an advisory board.

Kania C.J. who delivered the judgment of the majority of the court in *Atma Ram's* case, *supra*, said at page 160: —

"As the question of vagueness of grounds for the order of detention and the question whether supplementary grounds could be furnished after the grounds were first given to the detenu have arisen in various High Courts, we think it right that the general principles should be properly appreciated. The Constitution of India has given legislative powers to the States and the Central Government to pass laws permitting preventive detention. In order that a legislation permitting preventive detention may not be contended to be an infringement of the Fundamental Rights provided in Part III of the Constitution, Art. 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention, even if valid *ab initio*, ceases to be 'in accordance with procedure established by law' and infringes the fundamental right of the detenu guaranteed under Arts. 21 and 22(5) of the Constitution. In that way the subject of preventive detention has been brought into the chapter on Fundamental Rights. In the present case we are concerned only with cls. (5) and (6) of Art. 22.

It has to be borne in mind that the legislation in question is not an emergency legislation."

Later on at page 165 Kania C.J. said: —

"While the Constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose, by the words used in Art. 22(5) there is a clear obligation to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make a representation. It may be noticed that the Preventive Detention Act may not even contain machinery to have the representation looked

into by an independent authority or an advisory board. Under these circumstances, it is but right to emphasize that the communication made to the detained person to enable him to make the representation should, consistently with the privilege not to disclose facts which are not desirable to be disclosed in public interest, be as full and adequate as the circumstances permit and should be made as soon as it can be done. Any deviation from this rule is a deviation from the intention underlying Art. 22(5) of the Constitution."

Kania C.J. had earlier in his judgment held that the furnishing of "*additional grounds — i.e.* conclusions of fact required to bring about the satisfaction of the Government — at a later stage" will amount to an infringement of the right in article 22(5) of the detenu to be furnished, as soon as may be, with the grounds on which the order has been made "as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished as soon as may be". However, if at a later stage, a second communication contains particulars of or additional facts leading to the same conclusion of fact, which is the "ground" furnished in the first instance, will not be an infringement of either of the rights mentioned in article 22(5).

Applying the decision in *Atma Ram's* case, *supra,* the Indian Supreme Court in *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi*[7] held that a ground communicated to a detenu, so vague as to render it difficult if not impossible for the detenu to make an adequate representation to the appropriate authorities, is an infringement of his right under article 22(5) to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him" and "the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of article 21".

In India, although the Indian Supreme Court has consistently held that a court cannot substitute its own judgment for the satisfaction of the executive authority and to that end undertake an investigation into the sufficiency of the grounds on which such satisfaction was founded, the Indian Supreme Court has held since *Atma Ram's* case, *supra,* that a court can examine the grounds of detention, including subsequent particulars, supplied to a detenu to decide whether or not any or all of them are so vague or indefinite as not to afford a real opportunity to make a representation against the detention.

As I have indicated earlier, our enacted law on the subject of preventive detention is therefore different from the enacted law in India. Under the Constitution a detenu cannot be detained longer than three months unless an independent advisory board constituted in accordance with the Constitution has considered any representations made by him and made recommendations thereon to the President. Under the Indian Constitution, the Parliament of India is given power by article 22(7) to legislate

"the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4)".

Under our Act every decision of the President after considering the recommendations of the advisory board shall be final and shall not be called into question in any court (section 12(2)) whereas under the Indian Act the Central Government must revoke the order of detention, when made by an individual officer on whom power is conferred by the Indian Act to make a detention order, if the advisory board reports that there is no sufficient cause to make the order.

Having regard to all these considerations it seems to me that the reasons which moved the Indian Supreme Court to hold that the sufficiency of the grounds and particulars relating to the grounds of detention as supplied to the detenu is a justiciable issue because of a detenu's fundamental right under the Indian article 22(5) to be given the earliest opportunity of making effective representations against the order of detention are not applicable in the present case. In my judgment it is not open to a court in Singapore to examine the grounds and allegations of fact supplied to the applicant pursuant to article 151(1) and section 11(2) of the Act for the purpose of deciding whether or not some or all of them are so vague, unintelligible or indefinite as to be insufficient to enable the applicant to make an effective representation against the order of detention. The decision of the Federal Court of Malaysia in *Karam Singh's* case, *supra,* is to the like effect.

To hold otherwise would, in my opinion, be wholly inconsistent with the scheme of the Act under which the power to issue a detention order has been made to depend upon the existence of a state of mind in the President acting in accordance with the advice of the Cabinet which is a purely subjective condition so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention.

On the plain meaning of article 151 of the Constitution and the relevant sections of the Act which deal with the subject of preventive detention it seems to me to be clear that they provide for preventive detention to be exercised on the sole responsibility of the highest executive body, *i.e.* the President acting in accordance with the advice of the Cabinet, whose discretion is final, no recourse being permitted save only to an independent advisory body the composition of which is provided for in the Constitution itself (see article 151(2)). It is to be observed that neither in the Constitution nor in the Act is the President required to act in accordance with the recommendations of this advisory board thus emphasising in my view the purely executive nature of preventive detention measures. Apart from the mandatory requirement of a consideration by this advisory body, within three months of a person's detention, of his representations against the order of detention, the true safeguard that the Constitution and the Act provides, and is intended to provide, to the individual in respect of his fundamental right to liberty is that the power and the discretion to arbitrarily detain him without trial is conferred on the highest executive body in the country and on no other body or person.

The fifth point raised by Mr. Marshall is that if any of the grounds and allegations of fact supplied to the applicant are irrelevant to the purposes of the Act then

the order is bad because the detention cannot be justified and on this point he relied on decisions of the Indian Supreme Court. For the reasons I have already given on his fourth point I would reject this contention also.

The last point raised by Mr. Marshall is that a court can enquire into the question whether or not the President acted *mala fide* in making the order of detention and if *mala fides* is proved a court will hold that the applicant's detention is illegal.

I understand Mr. Marshall to use the expression "*mala fides*" in the sense that the President acting in accordance with the advice of the Cabinet arrived at his satisfaction without exercising care, caution and a sense of responsibility and in a casual and cavalier manner or on vague, irrelevant or incorrect grounds and facts so that his subjective satisfaction with respect to the applicant was not "with a view to preventing the applicant from acting in any manner prejudicial to the security of Singapore, etc." but for a different purpose altogether.

"*Mala fides*" or bad faith in the sense used by Mr. Marshall is not in my view a justiciable issue in the context of the Act and the power conferred by the Act on a body such as the President who has to act in accordance with the advice of the Cabinet to direct the issue of an order of detention if the President is satisfied with a view to preventing a person from acting in any manner prejudicial to the security of Singapore etc.

In my view the logical result of the argument advanced by Mr. Marshall would be that a court can substitute its own judgment for the subjective satisfaction of the President acting in accordance with the advice of the Cabinet, which satisfaction the Act provides is to be the sole condition of a lawful detention, and to that end undertake an investigation into the good faith or otherwise of the President who has to act in accordance with the advice of the Cabinet in arriving at his satisfaction. Such a result, having regard to the provisions of section 12(2) which make the decision of the President final and not to be called into question by any court, could not have been intended by Parliament.

Lastly, Mr. Marshall raises a technical point, namely that the applicant's detention is unlawful because there is no evidence before the court of the President's satisfaction because the order of detention which contains the recital that the President is satisfied, whilst made by the Minister for Home Affairs in accordance with section 8(1) of the Act, is signed by the Permanent Secretary to the Ministry of Home Affairs and not by the Minister himself.

I have earlier in this judgment decided that the satisfaction required by section 8(1) of the Act is, upon the true construction of the Act and article 5(1) of the Constitution of Singapore, the satisfaction of the President acting in accordance with the advice of the Cabinet. There is an affidavit by the Minister for Home Affairs of the Cabinet's satisfaction and of the President's satisfaction after receiving the advice of the Cabinet and that the said Minister then made the order of detention. On that affidavit and by virtue of section 35 of the Interpretation Act which enables a Permanent Secretary to signify under his hand his Minister's exercise of a power to, *inter alia*, issue an order I would reject Mr. Marshall's contention that the detention is unlawful.

The application is, accordingly, dismissed.

Application dismissed.

Solicitors: *David Marshall.*